

## Sieradzki, David L.

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**From:** Sieradzki, David L.  
**Sent:** Thursday, March 17, 2005 10:48 AM  
**To:** 'Christopher.Libertelli@fcc.gov'; 'Matthew Brill'; 'john.stanley@fcc.gov'; 'jessica.rosenworcel@fcc.gov'; 'daniel.gonzalez@fcc.gov'; 'Scott.Bergmann@fcc.gov'; 'austin.schlick@fcc.gov'; 'linda.kinney@fcc.gov'; 'Jeffrey.Dygert@fcc.gov'; 'andrea.kearney@fcc.gov'; 'Jeffrey.Carlisle@fcc.gov'; 'michelle.carey@fcc.gov'; 'Pamela.Arluk@fcc.gov'; 'thomas.navin@fcc.gov'; 'julie.veach@fcc.gov'  
**Cc:** 'Bob Bye'  
**Subject:** Cinergy Communications Filing Opposing BellSouth Preemption Petition

Ladies and Gentlemen,

I'm attaching a letter to be filed today on behalf of Cinergy Communications (a CLEC in Kentucky), urging the Commission to reject the BellSouth petition for preemption of the Kentucky PSC decision requiring BellSouth to provide DSL transmission together with UNE loops on a "commingled" basis. The letter presents three reasons:

First, the Commission cannot lawfully grant BellSouth's preemption petition because a federal court has already considered – and rejected – the very same preemption argument that BellSouth now attempts to re-litigate here. The U.S. Constitution does not permit the FCC to ignore or countermand that federal court decision. See *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993).

Second, the Commission has already held, in a portion of the *Triennial Review Order* that was not addressed by the Court of Appeals, that Sections 201, 202, and 251 of the Act obligate ILECs to offer UNEs and wholesale communications services on a "commingled" basis. The Commission's ruling is fully consistent with the Kentucky PSC decision requiring BellSouth to offer UNEs (loops) commingled with tariffed wholesale DSL transmission service.

Third, the Commission should refuse to countenance BellSouth's anti-competitive practice of tying access to DSL transmission to its retail voice service, which improperly interferes with consumers' "Internet freedoms."

I am setting up meetings for Monday, March 21 (when my client, Bob Bye, VP and General Counsel of Cinergy, will be in town) to discuss this proceeding with many of you. I would strongly urge you not to vote this item until you have given us the chance to explain our position.

Also, I'd particularly recommend that those of you in OGC and WCB take a careful look at the legal arguments presented in the attached letter. I believe that a decision to preempt the Kentucky PSC decision, as BellSouth requests, would be highly vulnerable to appeal.

Please feel free to contact me if you have any questions. Thank you very much.

--David Sieradzki  
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